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No. 277

IN THE

Supreme Court of the United States

October Term, 1959

ALBERT DAVIS, JR., *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner and respectfully moves this Court for leave to file the annexed Petition for Writ of Certiorari under Title 28 U.S.C., Section 1257 (3), and Section 2106 of Revised Title 28 U.S.C., also Section 237 (b) of the Judicial Code as amended 28 U.S.C., Section 344 (b) directed to the Court of Criminal Appeals of the State of Texas, to review an order and judgment of that Court on the 7th day of January, 1959; on the 1st day of April, 1959; and on May 6, 1959, and more particularly described in the petition, and for such other and further relief as may be just and proper.

Roberson L. King, Attorney for Petitioner

Henry E. Doyle, of Counsel
Attorney for Petitioner

NO. _____

IN THE

Supreme Court of the United States

October Term, 1959

ALBERT DAVIS, JR., *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner, Albert Davis, Jr., respectfully prays that a writ of certiorari issue to review a final order and decree of the Court of Criminal Appeals of Texas, which affirmed a final judgment of conviction rendered by the District Court of Brazoria County, Texas, convicting this petitioner of the offense of rape and fixing and assessing his punishment at death.

COURT OF CRIMINAL APPEALS OF TEXAS

The Court of Criminal Appeals of Texas is the Court of last resort in criminal matters in Texas under the Constitution and laws of the State of Texas.

Your petitioner is a citizen of the United States and of African descent; the complaining witness is a member of the Caucasian race.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is not yet reported. (See Opinion, Appendix A.)

JURISDICTION

The judgment of conviction in the District Court of Brazoria County, Texas, was entered on the 2nd day April 1958.

The Opinion of the Court of Criminal Appeals of Texas affirming the trial court's judgment was entered on the 7th day of January, 1959 (Appendix A).

Petitioner's second motion for rehearing was overruled by the Court of Criminal Appeals of Texas on the 6th day of May, 1959, without a written opinion, thereby said judgment of conviction became final so far as the Courts of the State of Texas are concerned.

Thereafter, the Court of Criminal Appeals of Texas issued its order staying the issuance of mandate on May 19, 1959, for a period of 90 days from such date in order that petitioner might apply to the Supreme Court of the United States for a writ of certorari. (See Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), and Section 2106 of Revised Title 28 U.S.C., also Section 237 (b) of the Judicial Code as amended and 28 U.S.C., Section 344 (b), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

FEDERAL QUESTIONS PRESENTED FOR REVIEW

(1) Whether the action of the trial court in communicating with the jury out of the presence of petitioner and his counsel during the jury's deliberation violates rights, privileges and immunities guaranteed to petitioner, an American citizen, under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and the action of the Court of Criminal Appeals of Texas in affirming the judgment of the trial court under such procedure violates rights, privileges and immunities guaranteed to petitioner, an American citizen, under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, where the undisputed evidences show that neither petitioner nor his counsel was present during a communication between the trial court and the jury during its deliberation.

(3) Whether in prior decided cases, where the facts are indistinguishable from the facts in the instant case and the Court of Criminal Appeals of Texas, refuses to apply the law as previously announced, to the instant case, denies to petitioner the equal protection of the laws and due process of law as is guaranteed to petitioner by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED ON

The constitutional provisions and statutes involved in this case are set forth in Appendix D attached to this petition.

STATEMENT OF FACTS MATERIAL TO A CONSIDERATION OF THE FEDERAL QUESTION PRESENTED

The petitioner, Albert Davis, Jr., was charged jointly with Alfred Royce Fritz, by indictment with the offense of rape, alleged to have been committeed in the County of Brazoria, State of Texas, on or about the 5th day of December, 1957, upon a young white girl by the name of Priscilla Louise Peloquen, who, along with petitioner and the other defendant, Alfred Royce Fritz, was of the age of seventeen years at the time of the alleged occurrence of the crime (S.F. p. 5). The petitioner, Albert Davis, Jr., is a Negro boy, and his co-defendant, Alfred Royce Fritz, is a white boy, and the prosecutrix's testimony was she was on her way home from work about 9:00 P.M. She then caught a bus and started for home and got off the bus at the corner of Ward and Chocolate Bayou Road in the City of Houston, Harris County, Texas, arriving at that point at about 9:35 P.M., on the night of December 5, 1958, (S.F. p. 6-7). The prosecutrix further states that after she had gotten off the bus and was walking toward her home, she was forcibly picked up, put into a pick-up truck, carried off, undressed and raped by a white man and a Negro man and brought back, and let out on the corner of Ward and Foster Streets, (S.F. p. 2). The prosecutrix also stated that she was raped first by the white boy, and then by the Negro boy, (S.F. p. 12). After returning to her home, she allegedly told her aunt about the incident and police officers were called, (S.F. p. 16). Thereafter, the officers went to the home of Albert Davis, Jr., on Wilmington Street and placed him under arrest. The white boy had already been arrested. At a show-up,

(S.F. p. 48), Miss Peloquen, the prosecutrix, allegedly identified the appellant, Albert Davis, Jr., and Alfred Royce Fritz out of a lineup of white boys and colored boys in the showup room at the police station as being the ones who had raped her. Thereafter, the petitioner and co-defendant, Alfred Royce Fritz, were duly indicted by the Brazoria County Grand Jury. On March 31, 1958, the cause came on for trial and a severance having been granted, the petitioner, Albert Davis, Jr., was tried first, and was assessed the death penalty on April 2, 1958, by the jury. Petitioner took timely bills of exceptions to all of the Court's rulings on which he made objections in the above mentioned trial procedure and same have been duly filed and made a part of this cause. Before the conclusion of the trial, petitioner, through his counsel, learned of some sort of communication between the judge and the jury out of petitioner's presence and out of the presence of his counsel and immediately made timely objection to the Court concerning such communication, but the Court overruled petitioner's objection to the communication between the Court and the jury, whereupon petitioner timely took his bill of exceptions. By due and timely procedural steps, petitioner presents his Writ of Certiorari to this Honorable Court.

ARGUMENT IN SUPPORT OF FEDERAL QUESTION (1)

Petitioner contends that he had a right to be present at all times during the trial of his case and that he was denied this right by the trial court when it engaged in a communication with the jury out of his presence and out of the presence of his attorney. The testimony is undisputed that the petitioner was not present at the time of the al-

leged communication, and in fact such was stipulated by the District Attorney (S.F., Hearing on Motion for New Trial, pages 21-22) and corroborated by the trial judge's order overruling petitioner's Bill of Exceptions (S.F. Hearing on Motion for New Trial, pages 26-27), and also by the testimony of the petitioner himself (S.F., Hearing on Motion for New Trial, pages 11-14), and also by petitioner's counsel, who testified that he was not present at the time of any communication between the trial judge and the jury during their deliberations on petitioner's case (S.F., Hearing on Motion for New Trial, pages 14-16). This procedural point has been before the Supreme Court of the United States on many occasions. In *Lewis v. United States*, 13 Sup. Ct. 136, this Court had an occasion to make clear the law of criminal procedure which guarantees the right of the defendant to be present at all stages of his trial in capital cases. In reversing the Circuit Court in the *Lewis* case, supra, Mr. Justice Shiras stated: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence." * * * "It is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury is hearing his case, but at any subsequent

stage when anything may be done in the prosecution by which he is to be affected." Quoting further from the same opinion the Court said: "And it appears to be well settled that where personal presence is necessary in point of law, the record must show that fact."

In *Hopt v. People of the Territory of Utah*, 39 Sup. Ct. 202, wherein a judgment involving a death sentence was reversed because the Criminal Code of Procedure of Utah, Section 218, providing for the personal presence of the defendant in felony cases as our statutes do, was not followed. The Court further said therein, "That which the law makes essential in proceeding involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." Commenting further in the *Hopt* cases the Court states, "Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution."

Looking again at the communication between the Court and the jury, out of the presence of the appellant and his counsel in the case at bar, there was a conflict in testimony as to just what the communication said. Its exact contents will never be known since "it was burned or torn up." But taking either answer as given by the Court or by the foreman of the jury, can it be said that petitioner nor

counsel needed to be present and know what was going on? Plain logic would show that apparently the jury was thinking of a life sentence or a 99 year sentence when they sent the question to the Court. Would not the petitioner and his counsel have had the rare privilege and opportunity to get an idea of what the jury was thinking of in terms of a verdict had they been present? Who can say that the defendant might not have at that time, by his mere presence, cemented the thinking of the juror or jurors in their deliberation on a life sentence or a 99 year sentence? Further, the petitioner would have had an opportunity to read the note himself, together with his counsel, and decide on what his next step in the procedure of the trial would have been, since the record affirmatively shows that at the time of the communication the jury had not reached its verdict. Further who can say that the defendant might not have at that time, by his mere presence, cemented the thinking of the juror or jurors in their deliberation on a life sentence or a 99 year sentence? Further, the petitioner would have had an opportunity to read the note himself, together with his counsel, and decide on what his next step in the procedure of the trial would have been, since the record affirmatively shows that at the time of the communication the jury had not reached it verdict. Further who can say that the Court's refusal to answer the question did not in some way affect the jury's deliberations?

ARGUMENT IN SUPPORT OF FEDERAL QUESTION (2)

Petitioner submits that this Court should determine for itself whether or not his rights have been violated, since

the facts relied upon for showing a deprivation of these rights are undisputed. The Court of Criminal Appeals of Texas has not cited a single case in support of its opinion, nor did the State of Texas through its District Attorneys present any case in Texas or elsewhere, where given the facts as exist in this case, a conviction has been upheld. The undisputed facts here show that petitioner was in the County Jail of Brazoria County, Texas, from shortly after his arrest continuously through all proceedings herein, and that he has never been on bond. Therefore, he could not be present in Court unless brought there by the sheriff or someone duly authorized to bring him. How could he complain of a violation of his rights until and unless he knew that acts were being done which violated them? The Court of Criminal Appeals of Texas recognized in its opinion (See Appendix C), that petitioner had a right to be present at all times during his trial, but nevertheless found that there was no violation of this right. The uncontradicted facts show that petitioner was not present. Was his absence due to any fault or omission on petitioner's part? The Court of Criminal Appeals of Texas said in *Crow v. State*, 230 S.W. 151: "It was the duty of the Court and the prosecuting attorney to see to it that the rights quaranteed to him by law when his liberty is involved were guaranteed to him on the trial, and that he is present in Court when by law he is entitled to be present. The due process provisions of the Fifth, Sixth and Fourteenth Amendment to the Constitution of the United States are offended by a procedure which fails to inform the petitioner that something is going on in the trial of his case when by law he is entitled to be present, and when, by circumstances beyond his control, he is prevented from so being.

ARGUMENT IN SUPPORT OF FEDERAL QUESTION (3)

The State of Texas has provided through its legislature certain procedural provisions for guaranteeing to petitioner that no communication between the Court and the jury shall be had after its retirement for deliberation unless same is done in petitioner's presence. Petitioner sets out these articles ver batim from the Code of Criminal Procedure, Vernon's Annotated Texas Statutes:

Article 676

"When the jury wish to communicate with the Court, they shall so notify the sheriff who shall inform the Court thereof; and they may be brought before the Court, and through their foreman, shall state to the Court verbally or in writing, what they desire to communicate."

Article 677

"The jury, after having retired, may ask further instructions of the judge on any matter of law. For this purpose the jury shall appear before the judge in open Court in a body, and through their foreman shall state to the Court, verbally or in writing, the particular point of law upon which they desire further instructions; and the Court shall give such instruction in writing, but no instruction shall be given except upon the particular points on which it is asked."

Article 679

"In felony, but not in misdemeanor cases, the defendant shall be present in the Court when any such proceeding is had as mentioned in the three preceding articles, and his counsel shall also be called."

These articles had been held to be mandatory and in an unbroken line of decisions where the facts were indistinguishable from the facts in petitioner's case, many of the cases holding that such provisions were intended to give effect to the Bill of Rights. In *Schafer v. State*, 40 S.W. 2d 147, the identical communication between Court and jury was before the Court, which, in reversing a trial court conviction, stated: "Under the terms of these statutes and the previous interpretation of them, it is essential that the procedure by which additional instructions are requested and given shall be in open Court and in the presence of the accused. It is conceived that these provisions of the statute were intended to give effect to the provision of the Bill of Rights guaranteeing a public trial. At all events, communications between the Court and jury touching the law of the case should be in open Court and in the presence of the accused. Obviously, there was a failure in the present instance to follow the mandatory provisions of the statutes quoted, in that the additional instructions given to the jury by the Court were not in open Court; nor were they requested in open Court as required by law. The request was not made in the presence of the accused, nor was the additional charge given to the jury in his presence. The error is of a nature from which injury is presumed."

Again in *Booth v. State*, 145 S.W. 923, the Court of Criminal Appeals of Texas in reversing the trial court stated: "This Court has held, in all the decisions construing these articles, that when the trial is for a felony, the presence of the defendant is necessary whenever any proceeding mentioned in any of the preceding articles is had in the case." To the same effect the Court in reversing a con-

viction where communication between the court and the jury in the absence of the defendant had taken place, stated in *Cartwright v. State*, 97 Tex. Cr. R. 230, 259 S.W. 1085: "Where the record shows the absence of accused during any important step of the trial, or even raises the question of possible injury from something occurring in his absence during the trial, this Court would not feel called upon to speculate upon the matter . . ."

The opinions of the Court of Criminal Appeals of Texas in *Reid v. State*, 133 S.W. 2d 979; and *Crow v. State*, Supra; all follow the same reasoning and conclusion on the part of the Court of Criminal Appeals of Texas. Indeed it was thought by a great number of the members of the bench and bar of Texas that the case of *White v. State*, 195 S.W. 2d 141, involving the question of communication between the trial judge and the jury out of the presence of defendant, put at rest the construction of Articles 676, 677 and 679 mentioned above by the Court of Criminal Appeals. That court in reversing a conviction of the trial court stated, "These are mandatory provisions and should be strictly adhered to in the trial of cases. This Court has held in many cases that the presence of the accused, which is specifically required by the article above quoted, cannot be waived by the attorney for the accused."

Petitioner further submits that the Bill of Rights, Article I, Section 10, Constitution of the State of Texas, guarantees to the petitioner, among other things, his right to a public trial, which he submits is not guaranteed if and when communications are had between the court and the jury out of his presence and out of the presence of his counsel as the record in this case discloses.

Thus, it is shown that petitioner is entitled to the rights, privileges and immunities guaranteed him under his own laws and provisions set up by the Legislature of the State of Texas for him, and the Court of Criminal Appeals of Texas has stated on many occasions that it would not violate the clear and plain intention of the Legislature, when such Legislature sets forth its intendment as it does in these statutes. These Articles under consideration were intended to prevent any communications with, and/or additional instructions to juries in criminal felony cases after they have retired for their deliberations, unless such is done in the presence of the defendant as provided for by Article 679. The Legislature has given him this right and he contends that it is beyond the power of the trial judge to take it away from him. See *Bruno v. United States*, 60 Sup. St. 198.

THE STAGE IN THE PROCEEDINGS IN THE COURTS BELOW AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTIONS HERE PRESENTED WERE RAISED.

The questions here presented were raised first in the trial court by petitioner's motion for mis-trial (S.F. Hearing on Motion for New Trial, Page 26-27, Defendant's Exhibit A) which motion was presented to the trial court while the jury was still deliberating. The trial court overruled such motion, to which the petitioner duly excepted, and his exceptions to the court's ruling duly raised a question of whether the communication between the trial court and the jury violated petitioner's rights, privileges and immunities guaranteed to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United

States. Petitioner again presented the questions made the basis of this petition to the trial court on June 6, 1958, in his motion for a new trial which was overruled by the trial court on June 6, 1958. (Exhibit B).

Each of such questions was raised in the Court of Criminal Appeals of Texas by bills of exceptions, brief, and the first motion for rehearing and by petitioner's second motion for rehearing filed in the Court of Criminal Appeals of Texas, and said Court refused to sustain petitioner's objections set forth in his brief, bills of exceptions and motions for rehearing, thereby affirming the action of the trial court.

SPECIFICATION OF ERRORS

The Court of Criminal Appeals of Texas erred:

(1) In holding that the facts in the case before it did not show the violation of the constitutional guarantee to petitioner to be present at all times during the trial of his case and that no injury was done to petitioner.

(2) In holding that the failure of the trial court to communicate with the jury after it had retired for deliberation only in the presence of the defendant and in open court as prescribed by the laws of the State of Texas, did not deprive petitioner of his rights, privileges and immunities guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

(3) In failing to hold that the provisions of Article 676, 677 and 679 were mandatory provisions to be strictly adhered to in the trial of cases in order to further protect and safeguard rights guaranteed by the Bill of Rights.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI PRESENTED UNDER ERRORS (1) AND (2)

As it has been previously pointed out, neither petitioner, nor his counsel were present when the communication between the trial judge and the jury made the basis of this error transpired. There can be no question as to whether or not the petitioner was present, and since there is no evidence whatsoever that he waived the right to be present and was at all times in the County Jail of Brazoria County, Texas, in the same building where the trial was held. In order to sustain its affirmance of the trial court's judgment, the Court of Criminal Appeals of Texas is saying by its opinion that no injury was done to petitioner, by reason of his absence at the time the alleged communication took place, although the court must concede that the petitioner was not present and knew nothing of it until after the jury had reached a verdict. In all cases touching upon the subject of unauthorized communication between the judge and the jury, it is the fact of communication, out of the presence of the defendant and his counsel that offends due process. The Legislature certainly intended that the jury would have the right to communicate with the Court, as to further instructions and as to rehearing portions of the testimony if they so desired, but realizing that to permit either of these things to be done out of the presence of the defendant and his counsel, might be dangerous to the rights of the accused, in that they might open the way to abuses, the Legislature wisely added Article 679 in order to give the accused an opportunity to be present and to object and to take exceptions if he so desired.

The appellant cannot conceive how the Court of Criminal Appeals of Texas arrived at the conclusion that he was not injured, since he received the highest possible penalty, death. To indulge in the speculation of whether such error on the part of the trial court was prejudicial would be putting the appellant in the impossible position of ferreting out the mental processes of the jurors after they received the judge's reply. As was said in *Af Fook Chang v. United States*, 91 F. 2d 850, "Chances for error are too great."

The cases uniformly hold that the defendant in felony criminal cases has a right to see and be seen, hear and be heard, whenever any communication concerning his substantial rights is had between the court and jury. The petitioner further contends that the right to be present is a constitutional right; that such constitutional right is substantial and that the doctrine of harmless error has no application where a substantial right has been violated. See *Bruno v. United States*, supra; *Glasser v. United States*, 62 Sup. Cr. 457.

In *Cartwright v. State*, supra, the Court of Criminal Appeals of Texas used language as follows in reversing the lower Court's conviction: "Where the record shows the absence of accused during any important step of the trial, or even raises the question of possible injury from something occurring in his absence during the trial, this Court would not feel called upon to speculate upon the matter . . ." The record in this case shows that the petitioner had filed a motion for a suspended sentence upon an affidavit that he had not been convicted of a felony in the state or any other state. If petitioner and his counsel had been present at the time the communciation transpired, petitioner would have had the opportunity, had he desired

to change his plea and ask the mercy of the jury in assessing his penalty. This he could not do unless he knew of the communication complained of in his Bill of Exceptions which are a part of the record in this case.

This court should grant this Writ of Certiorari so that the holdings in the cases cited herein will not hereafter be misinterpreted and in order that petitioner may be tried according to the prescribed mode clearly set out in the cases and statutes of this Court and of the State of Texas.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI PRESENTED UNDER ERROR (3)

If Articles 676, 677 and 679 were ambiguous or difficult to construe and apply, then it would be conceivable that various and conflicting opinions would flow from the Court of Criminal Appeals in attempting to decide case brought before it. Petitioner submits that the State's briefs do not show a single case wherein the facts show the absence of the defendant in a felony criminal case where a communication is had between the court and jury that the Court of Criminal Appeals of Texas has not reversed the conviction of the lower court. Petitioner can find no precedence whatsoever for the holding of the Court of Criminal Appeals of Texas in his case. That court needed only to have followed the well considered and decided cases of its previous rulings to reverse conviction of the trial court in petitioner's case. Such opinions considered the right to be present under such circumstances as involved communications between the trial judge and the jury to be fundamental and the statutes requiring peti-

tioner's presence were held to be mandatory. So intent was the Legislature of the State of Texas in safeguarding the petitioner's right to be present during any communication with the jury, it redundantly passed Articles 676, 677 and 679 of the Code of Criminal Procedure to make certain that a right so fundamental would not be denied to petitioner. Petitioner submits that it is not within the province of the trial court nor the Court of Criminal Appeals of Texas to take this right away from him. In a proceeding such as this, where the petitioner's life is at stake, the Fourteenth Amendment commands that his trial be according to the process of law which has been prescribed for his benefit, and it is impossible that there can be any due process unless the procedural rules laid down for the trial of causes are adhered to, and followed by the trial court. Petitioner further submits that the very process of a jury and a court communicating out of his presence and the presence of his counsel, is so susceptible of abuse that no one would ever know whether a fair trial had been had or not. In the case before this court no one knows exactly what the note said, nor what the answer said, except by secondary evidence, since the note itself was either "burned or torn up" in the jury room without petitioner's ever having a chance to see the contents thereof.

The Court of Criminal Appeals of Texas is not blind to the guarantee of procedural due process and has, on many occasions reversed convictions of the trial courts without giving any consideration whatsoever to the substantive facts in the case. On numerous occasions errors in the indictment, the casual comment of a trial judge in open court with reference to jury separation during lunch, the fact that an attorney who represented a defendant in a trial court had an expired license, all matters involving

only procedural violations of the Statutes of the State of Texas were sufficient for the appellate court to grant reversals in the convictions. In none of these cases the appellate court go into the question of harm, but recognized that the appellants therein had been denied their constitutional rights to be tried according to the mandatory provisions of the Constitution and Statutes of the State of Texas. Assuming that this Court must find that petitioner was denied the right to be present during the communication between the jury and the trial judge, petitioner submits that this denial in itself constitutes harm since the very substance of the constitution guarantee is to assure petitioner that he shall be present at all times during his trial. To exclude him under such conditions violates our fundamental concept of the rules of fairness. Procedural due process requires that a trial be conducted according to the prescribed rules and the Fourteenth Amendment guarantees that petitioner shall have had a fair trial only when the fundamental rules laid out for such trial have been complied with.

The above stated procedural statutes are so interwoven with the rights protected under the Federal Constitution and Federal laws as to render them mutually dependent upon each other and must be construed together, and the rights under the Federal Constitution as embodied and embraced in the Texas Statutes must be determined under the provisions of such statutes, the Constitution of the United States and the laws of the United States, and petitioner's rights cannot be determined upon the record in this case without a construction and a determination of his rights under the Constitution of the United States and Federal laws.

Petitioner earnestly contends that this Honorable Court should grant the Writ of Certiorari in this case so as to set at rest the law with reference to petitioner's right to be present at all stages during the trial of this case wherein communications are held which are pertinent to his constitutional rights.

By denying to petitioner his constitutional right to be present at all stages of his trial, the State of Texas, through its courts, has deprived petitioner of his life without due process of law and denied to him the equal protection of the laws as guaranteed to petitioner by the Federal Constitution.

Therefore, petitioner urges upon this Court that it has jurisdiction and upon the facts in the record in this case and the law, petitioner is entitled to have his application for writ of Certiorari granted.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Texas should be granted and the judgment of the Court of Criminal Appeals reversed.

Respectfully submitted,

ALBERT DAVIS, JR.

ROBERSON L. KING,
Attorney for Petitioner

United States of America
The State of Texas
County of Brazoria

I, Albert Davis, Jr., being duly sworn, depose and say that I am the petitioner in the above entitled cause; that I have read the foregoing petition and that the same is true as I verily believe.

ALBERT DAVIS, JR.

SUBSCRIBED and sworn to before me by the petitioner, Albert Davis, Jr., on this the day of ; 1959.

Notary Public in and for
Brazoria County, Texas

(Seal)

I, Roberson L. King, attorney for petitioner, admitted to practice in the Supreme Court of the United States, hereby certify that I prepared the foregoing Petition for Writ of Certiorari and know the contents thereof; that the same is not made for the purpose of delay; and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the Writ issued.

ROBERSON L. KING

I, Roberson L. King, attorney for Albert Davis, Jr., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of July, 1959, I served a copy of the foregoing Motion for Leave to File Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas, in the Supreme Court of the United States and Petition for Writ of Certiorari, as follows:

(1) On the Honorable Will Wilson, Attorney General of Texas, by mailing a copy in a duly addressed stamped envelope with certified mail, postage prepaid, to the Capitol Building, in Austin, Texas, and,

(2) On Honorable Sam Lee, District Attorney, Brazoria County, Texas, Angleton, Texas, Attorney of record for the State of Texas, Respondent, by mailing a copy in a duly addressed stamped envelope, with certified mail, postage prepaid, County Courthouse, Angleton, Texas.

ROBERSON L. KING

APPENDIX A

Albert Davis, Jr., Appellant
No. 30,202 v. —Appeal from Brazoria County
The State of Texas, Appellee

OPINION

The offense is rape; the punishment, death.

No contention is advanced that the facts do not support the conviction or that the court erred in the admission or rejection of evidence, and for this reason the facts will be summarized.

Prosecutrix, a 17-year old Houston working girl, while on her way home at night, was abducted by the appellant and his companion, carried against her will over into a rural section of Brazoria County, where she was disrobed and ravished by each man in turn in the back of the pickup truck in which they were traveling. After the attack she was carried back to Houston and released near her home. The appellant and his co-indictee were apprehended and identified the same night.

The appellant did not testify or offer any evidence in his own behalf.

We find the evidence sufficient to support the conviction and shall discuss the question brought forward by studious counsel in brief and oral argument.

It arises out of a note which was sent to the court by the foreman of the jury and by the court answered in the absence of the appellant or his attorneys. The note read: "If the defendant is given 99 years sentence can he ever receive a parole?" The answer read: "I am not permitted to answer your question."

The answer to the question raised by appellant is found in Articles 676-7-8 and 9, V.A.C.C.P., and the cases which have been decided under said Articles, and does not, as we view it, present a constitutional question. This is so because the court refused to answer the inquiry, did so in as few words as he could, and therefore it could not be said, with logic, that the exchange constituted a phase of the trial at which appellant was entitled to be present. As has often been said, we are not unmindful of the provisions of the above Articles nor are we unaware that this Court has on occasion said that they are mandatory under the facts then before the Court in such cases.

We are equally aware of the holdings to the effect that where the judge refuses to answer the question, and says no more, reversible error is not reflected. See Note, 41 A.L.R. 2d 227, 272.

The State relies principally upon *Lamkin v. State*, 301 S.W. 2d 922; *Barber v. State*, 258 S.W. 2d 87; *Moore v. State*, 213 S.W. 2d 844; *Chointere v. State*, 204 S.W. 2d 840; *Guajardo v. State*, 139 S.W. 2d 35; *Prater v. State*, 95 S.W. 2d 961; *Heald v. State*, 92 S.W. 2d 1042; and *Willis v. State*, 6 S.W. 357.

The appellant, on the other hand, relies upon *White v. State*, 195 S.W. 2d 141; *Reid v. State*, 133 S.W. 2d 979; *Schafer v. State*, 40 S.W. 2d 147; *Hart v. State*, 255 S.W. 414; *Crow v. State*, 230 S.W. 148; *Fina v. U. S.*, 46 F. 2d 643; *Lewis v. U. S.*, 13 S. Ct. 136; *State v. Cotter*, 54 N.W. 2d 43; and *Wiederhaupt v. Hoelzel*, 35 N.W. 2d 1207.

At the outset, we observe that it is not the sending of the note but the court's *answer* which is potentially dangerous.

In White, which is more difficult to distinguish from any of the other cases relied upon by the appellant, we did have an instruction on the law, even though it is an innocuous one, because there the court's answer informed the jury that their inquiry concerned "a matter over which neither this Court nor the jury has jurisdiction." In other words, we did not in White have a simple refusal to answer the question, as in the case at bar, but had the further element that the court in his answer to their note told the jury that their question related to a matter over which they had no jurisdiction.

Schafer is easily distinguished from the case at bar because there the court in his answer instructed the jury as to the law on matters not covered by his original written charge.

Hart presented a situation where the court by his answer was endeavoring to coerce them into reaching a decision, and can have no application to the case at bar.

Reid does not control the case at bar because in that case the court proceeded with the trial after the accused had suffered an epileptic stroke and was unaware of what was taking place in the courtroom.

In Crow, a juror who had been accepted in the case was excused in the absence and without the knowledge of the accused.

In Fina, the court gave a supplemental charge to the jury in the absence of the accused, and, since the nature of the charge did not appear in the record, the appellate court presumed injury. In the case at bar, no charge was given, and the exact phraseology of the court's answer to the jury's inquiry appears in this record.

In Lewis, the accused was not shown to have been present at the time the jury panel was challenged, which the Supreme Court of the United States held to be an essential part of the trial.

In Cotter, the sheriff, who was a State witness, went into the jury quarters where they were deliberating and told them that it "would not hurt his feelings if they hurried." The court held that this constituted an unauthorized communication with the jury in the absence of the accused.

In Wiedenhaupt, the court reporter went into the jury room, took down certain questions which they wanted to ask the judge, communicated with the judge by telephone, and then returned to the jury room where he read the judge's answer. While it is true that the court there said in a civil case that a defeated party should not be required to show injury, we have concluded that the record in the case at bar affirmatively reflects the absence of injury.

We hold that in cases such as the one at bar, where the judge refuses to answer the question and says no more, reversible error is not reflected by his failure to bring the jury into the courtroom in the presence of the accused and his counsel in order to deliver his note of refusal to them.

Having so decided, the judgment of the trial court is affirmed.

Morrison, *Presiding Judge*

(Delivered January 7, 1959)

APPENDIX B

Albert Davis, Jr., Appellant
No. 30,202 v. —Appeal from Brazoria County
The State of Texas, Appellee

OPINION

ON APPELLANT'S MOTION FOR REHEARING

We have again reviewed this case in the light of appellant's contention, and remain convinced that reversible error is not reflected.

We did not intend that our original holding should be construed as a finding that a constitutional question was not involved in the contention of appellant — that is, that he was denied the right to be present at all times during the trial of his case.

What we held is that the facts did not show the violation of that or any other constitutional guarantee.

Appellant's Motion for rehearing is overruled.

Davidson, *Judge*

(Delivered April 1, 1959)

APPENDIX C

Albert Davis, Jr., Appellant
No. 30,202 v. —Appeal from Brazoria County
The State of Texas, Appellee

ORDER STAYING ISSUANCE OF MANDATE

The application of Albert Davis, Jr., for a stay of issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety (90) days from this date in order that he may apply to the Supreme Court of the United States for a writ of certiorari.

And the Clerk is further directed that in the event the writ is granted by the Supreme Court of the United States, the issuance of the mandate be delayed until final action by that Court upon the matter.

This the 19th day of May, A.D. 1959.

/s/ W. A. Morrison
Presiding Judge,
Court of Criminal Appeals
of Texas

A TRUE COPY
ATTEST:

/s/ Glenn Haynes
Clerk, Court of Criminal Appeals
of Texas

EXHIBIT A

NO. 5477

The State of Texas	)	IN THE DISTRICT COURT
vs.	)	OF BRAZORIA COUNTY,
Alfred Royce Fritz and Albert Davis, Jr., Albert Davis, Jr., alone on trial	)	TEXAS

MOTION FOR MISTRIAL

Now comes Albert Davis, Jr., one of the defendants in the above styled and numbered cause, and files this his motion for mis-trial, and for grounds for such motion alleges as follows:

1.

That after both sides had rested in said case, and arguments had been made to the jury, the Court charged the jury and the jury retired for its deliberations. During the course of the deliberations the jury sent a note or communication to the Court making certain inquiries concerning their verdict in said case. The Court thereupon made a written reply to said question. The question propounded to the Court was "If the defendant is given 99 years sentence can he ever receive a parole," to which the Court in writing, replied "I am not permitted to answer your question." That the above referred to communication between the Court and the jury was out of the presence of the defendant and defendant's counsel, in violation of the law and the defendant's rights in the case, and for this reason defendant prays that the Court declare a mis-trial in the above styled cause for the reason that said procedure was prejudicial to his rights in this cause, and in

violation of Articles 676, 677 and 679, code of Criminal Procedure of the State of Texas.

/s/ Albert Davis, Jr.
ALBERT DAVIS, JR.

HENRY E. DOYLE
618 Prairie
Houston, Texas

DICKSON & FLEMING
Scanlan Building
Houston 2, Texas

BIERWIRTH & ROSENBAUM
Scanlan Building
Houston 2, Texas

By: /s/ Henry E. Doyle
Attorneys for Defendant

ORDER

The above and foregoing motion for mis-trial having been duly and timely presented to the Court, and having been by the Court duly considered, the Court makes the following statement and ruling: That in evidence of the occurrence and happening of the foregoing alleged communication between the Court and jury, same is duly admitted and authenticated by this the testimony of the Court; and that, nothwithstanding same, the Court is of the opinion that said motion for mis-trial should be and the same is hereby in all things overruled and denied; to which action of the Court the defendant then and there in open court duly excepted.

/s/ G. P. Hardy, Jr.
Judge Presiding

EXHIBIT B

NO. 5477

THE STATE OF TEXAS)	IN THE
VS.)	DISTRICT COURT OF
ALFRED ROYCE FRITZ)	BRAZORIA COUNTY,
AND ALBERT DAVIS,)	TEXAS
JR., ALBERT DAVIS,)	
JR., ALONE BEING ON)	
TRIAL)	

ORDER OVERRULING MOTION FOR NEW TRIAL

BE IT REMEMBERED that on this the 6th day of June, A.D., 1958, there came on to be heard the Defendant's Albert Davis, Jr.'s Motion for a New Trial in the above entitled and numbered cause, and the Court after having read the pleadings, heard the evidence, and considered the same, is of the opinion that said Motion is not well taken and should be in all things overruled.

It is therefore, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant's, Albert Davis, Jr.'s Motion for a New Trial be and the same is here now in all things overruled, to which action of the Court the Defendant, Albert Davis, Jr., then and there in open court duly excepted and gave notice of appeal to the Court of Criminal Appeals of Texas at Austin, Texas.

G. P. HARDY, JR.
Judge of the Court

APPROVED AS TO FORM:

/s/ Sam Lee
Criminal District Attorney
of Brazoria County, Texas,
Attorney for the State

/s/ Henry E. Doyle
Attorney at Law,
Houston, Texas,
Attorney for the Defendant

APPENDIX D

Articles 676, 677 and 679 of the Code of Criminal Procedure which state as follows:

Article 676

"When the jury wish to communicate with the Court, they shall so notify the sheriff who shall inform the court thereof; and they may be brought before the Court, and through their foreman, shall state to the court verbally or in writing, what they desire to communicate."

Article 677

"The jury, after having retired, may ask further instructions of the judge as to any matter of law. For this purpose the jury shall appear before the judge in open court in a body, and through their foreman shall state to the court, verbally or in writing, the particular point of law upon which they desire further instructions; and the court shall give such instruction in writing, but no instruction shall be given except upon the particular point on which it is asked."

Article 679

"In felony but not in misdemeanor cases the defendant shall be present in the court when any such proceeding is had as mentioned in the three preceding articles and his counsel shall also be called."

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.